85-1075

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

HOWARD DOUGLAS DANIEL,
Petitioner,

VS.

SECURITY PACIFIC NATIONAL BANK,
COMMERCIAL BANK OF SAN FRANCISCO,
LEASCO CAPITAL EQUIPMENT CORPORATION and
CAPITAL RESERVE LEASING CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN H. MACCONAGHY
2354 Powell Street
Emeryville, California 94608
(415) 652-5512
Counsel for Petitioner

KOLLER & MACCONAGHY
LYNN ANDERSON KOLLER
2354 Powell Street,
Watergate Center
Emeryville, California 94608
Of Counsel for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED FOR REVIEW

Is the interest of a bankruptcy debtor in an I.R.S.-qualified corporate pension and profit-sharing plan exempt from his bankruptcy estate due to the prohibitions against involuntary alienation of those interests established by the Internal Revenue Code and the Employee Retirement Income Security Act of 1974?

TABLE OF CONTENTS

	Page
Question presented for review	i
Opinion below	1
Jurisdiction	2
Statutory provisions involved	2
Statement of the case	3
Reasons for granting the writ	6
1. The decision below seriously undermines the congressional scheme protecting pension plan interests from judgment creditors	6
2. The decision below conflicts with decisions of the fourth and sixth circuit courts of appeal on the same matter	9
3. Resolution of the issues in this case is important to a substantial segment of American society	12
Conclusion	13

TABLE OF AUTHORITIES CITED

Cases

Page

Commercial Mortgage Ins., Inc. v. Citizens National Bank, 526 F.Supp. 510 (N.D.Tex. 1981) 10

General Motors v. Buha, 623 F.2d 455 (6th Cir.—1980) ..6, 10

In re Blaine Richards & Co., Inc., 16 B.R.W. 362 (Bkrtcy.E.D.N.Y., 1982) 8

In re Hinshaw, 23 B.R.W. 233 (Bkrtcy.D.Kan. 1982) ...11, 12

In re Holt, 32 B.R.W. 767 (Bkrtcy E.D.Tenn. 1983) 11

In re Lichstrahl, 750 F.2d 1488 (11th Cir.—1985) 11

In re Pruitt, 30 B.R.W. 330 (Bkrtcy.D.Colo., 1983) 11

In re Rogers, 24 B.R.W. 181 (Bkrtcy.D.Ariz. 1982) 11

In re Threwitt, 24 B.R.W. 927 (D.C.D.Kan. 1982) 10, 11

Jacks v. Monterey County etc. Bank, 70 Cal. 2d 494 (127 P.2d 532) (1942) 10

Matter of Berndt, 34 B.R.W. 515 (Bkrtcy.N.D.Ind., 1983) 11

Matter of Goff, 706 F.2d 574 (5th Cir.—1983) 11

Matter of Graham, 776 F.2d 1268 (8th Cir.—1984) 11

Matter of Johnson, 724 F.2d 1138 (5th Cir.—1984) 11

Matter of Smith, 640 F.2d 888 (7th Cir.—1981) 7

McLean v. Cent. States S&S Areas Pen. Fund, 762 F.2d 1204 (4th Cir.—1985) 9

Railway Labor Executives Assoc. v. Gibbons, 455 U.S. 445 (102 S.Ct. 1169; 71 L.Ed. 2d 335) (1982) 8

Regan v. Ross, 691 F.2d 81 (2d Cir.—1982) 11

Seymour v. McAvoy, 121 Cal. 438 (53 P. 946) (1898) ... 10

Tenneco, Inc. v. First Virginia Bank of Tidewater, 678 F.2d 688 (4th Cir.—1983) 10

Warren v. G. M. Scott & Sons, 34 B.R.W. 543 (Bkrtcy.S.D.Ohio, 1983) 11

TABLE OF AUTHORITIES CITED

Statutes and Rules

Page

Bankruptcy Rule:
4003 5
8002 5

California Code of Civil Procedure § 690.18(d) 5

26 C.F.R. § 1.401(a)-(13)(b) 3, 6, 7, 10

P/L. 98-353 2

11 U.S.C.:
§ 303(b)(1) 7
§ 522 ..... 2, 6, 8, 11, 12
§ 522(b)(2) 5, 7, 8
§ 522(b)(2)(A) 5, 11
§ 522(d) and (2) 9
§ 541 2
§ 541(a)(2) 6
§ 541(c)(2) 5, 7
§ 704 and 507 7

26 U.S.C. § 401(a)(13) 3, 4, 5, 7, 9, 11, 12

28 U.S.C. § 1334 3

29 U.S.C.:
§ 1001(a) 6
§ 1056 ..... 7, 9, 11, 12
§ 1056(d) 3, 4, 5

Other Authorities

3 Collier on Bankruptcy (15th edn), ¶ 522.01, pp. 522-8 to 522-9 6

H.R. No. 807, 93rd Cong., 2nd sess. p. 68 6

H.R. No. 95-595, 95th Cong., 1st Sess.:
p. 126-6 6
p. 360 ..... 8, 11

S.R. 95-989, 95th Cong., 2nd Sess. 751 (1978) 11

U.S. Dept. of Commerce, *Statistical Abstract of the United States 1984* (104th edn), p. 356 12

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SECURITY PACIFIC NATIONAL BANK,
COMMERCIAL BANK OF SAN FRANCISCO,
LEASCO CAPITAL EQUIPMENT CORPORATION and
CAPITAL RESERVE LEASING CORPORATION,
Respondents.

The petitioner Howard Douglas Daniel respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeal for the Ninth Circuit entered in this proceeding on September 20, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 771 F.2d 352 (9th Circuit—1985). A copy of that opinion is attached as Appendix A. The unreported opinions of the United States District Court for the Northern District of California and the United States Bankruptcy Court for the Northern District of California are attached as Appendices B and C, respectively.

JURISDICTION

The decree of the Court of Appeals affirming the judgment disallowing the claim of exemption was entered on September 20, 1985. No petition for rehearing was filed by any party. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 11

§ 541 Property of the Estate

(a) The commencement of a case under Section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all of the following property, wherever located:

(1) Except as provided in subdivision (b) and (c)(2) of this section, all legal or equitable interest of the debtor as of the commencement of the case,

(c)(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

§ 522 Exemptions[1]

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located

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[1] 11 U.S.C. §§ 541 and 522 were subsequently amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353; however, the operative portions of both sections remain the same insofar as they relate to this case.

for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place;

United States Code, Title 29

§ 1056(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

United States Code, Title 26

§ 401(a)(13)

A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs.

United States Code of Federal Regulations, Title 26, § 1.401(a)-(13)(b)

No assignment or alienation.—(1) General rule. Under section 401(a)(13) a trust will not be qualified unless the plan of which the trust is a part provides that benefits under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy or other legal or equitable process.

STATEMENT OF THE CASE

This is an appeal arising out of a bankruptcy proceeding. Federal subject matter jurisdiction is based on former 28 U.S.C. § 1471, now 28 U.S.C. § 1334.

The petitioner Howard Daniel (debtor in the above-noted bankruptcy proceeding) is a 50 year old physician employed by his own professional medical corporation. Approximately 15 years

ago the corporation formed a defined contribution pension and profit-sharing plan. That plan was approved as "qualified" by the Internal Revenue Service on March 25, 1971. Section 8.05 of the petitioner's plan contained the standard anti-alienation clause required by 29 U.S.C. § 1056(d) and 26 U.S.C. § 401(a)(13), *supra*. (Appendix A, p. 2.)

The petitioner is one of four beneficiaries of the plan. The plan has been active since its inception, well before the start of the petitioner's financial problems. The dates and amounts of the corporation's contributions on behalf of the debtor and the other three beneficiaries are as follows:

Date of Plan Contribution	Fiscal Year Ending	Amount
3/15/71	3/31/71	$ 8,720.00
3/20/72	3/31/72	10,000.00
3/18/73	3/31/73	10,000.00
2/14/74	3/31/74	500.00
N/A	3/31/75	0.00
3/ 1/76	3/31/76	100.00
3/21/77	3/31/77	15,360.00
3/31/78	3/31/78	15,000.00
3/30/79	3/31/79	2,000.00
3/28/80	3/31/80	20,000.00
3/30/81	3/31/81	23,000.00
3/29/82	3/31/82	23,638.00
9/30/82	3/31/83	39,000.00

Dr. Daniel testified that all contributions and investment decisions in connnection with the plan were made with the advice of his accountant. One of the investments was a May, 1980, $75,000 loan to Dr. Daniel secured by his interest in the plan and bearing interest at the rate of 12.5% per annum. (Appendix A, pp. 2-3.) All plan contributions, including the final $39,000 contribution, were within the I.R.S. guidelines. Shortly prior to trial, the plan was subjected to an I.R.S. audit; the auditor found that all documentation was in order and that nothing was awry, including the $75,000 loan taken by Dr. Daniel (R.T., 32-33).

On October 12, 1982, the debtor filed his petition for relief under Chapter 7 of the Bankruptcy Code of 1978 in the United States Bankruptcy Court for the Northern District of California.

In the appropriate place in his bankruptcy schedules, he declared certain of his assets exempt from bankruptcy administration, electing the State and nonbankruptcy federal set of exemptions[2] allowed by 11 U.S.C. § 522(b)(2). Those assets included his interest in the pension and profit-sharing plan. At the time of filing, his interest was valued at ninety-eight thousand dollars ($98,000.00) out of a total plan fund of one hundred seventy-nine thousand one hundred forty-four dollars ($179,144.00).

On December 8, 1982, certain of his creditors, respondents SECURITY PACIFIC NATIONAL BANK, COMMERCIAL BANK OF SAN FRANCISCO, LEASCO CAPITAL CORPORATION and CAPITAL RESERVE LEASING CORPORATION filed an Objection to Claim of Exemption with respect to this asset pursuant to Bankruptcy Rule 4003. On January 24, 1984, after a two day evidentiary hearing, the Bankruptcy Court entered its Order Sustaining Objection to Claim of Exemption. The Bankruptcy Court's rationale was that it did not interpret the anti-alienation provisions applicable to pension plans contained in 29 U.S.C. § 1056(d) and 26 U.S.C. § 401(a)(13) to be a type of nonbankruptcy exemption from execution recognized by 11 U.S.C. §§ 522(b)(2)(A)[3] or 541(c)(2), *supra*. That Order required petitioner to turn over his interest in the retirement plan to his Trustee in Bankruptcy for distribution to his creditors. (Appendix C.)

Petitioner then filed a timely Notice of Appeal to the United States District Court for the Northern District of California pursuant to Bankruptcy Rule 8002. On July 27, 1984, the District

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[2] The applicable State law provision was former California Code of Civil Procedure § 690.18(d) which provided that interests in "pension and profit sharing plans . . . designed and used for retirement purposes" were exempt from execution.

[3] The Bankruptcy Court further held that petitioner's interest in the pension plan did not qualify as exempt under the California statute, Code of Civil Procedure § 690.18(d), because, notwithstanding the I.R.S. approval of the plan, it was not "designed and used for retirement purposes." Petitioner Daniel does not seek review by this Court of those State law issues.

Court entered its Memorandum Decision and Order, which affirmed the Bankruptcy Court order. (Appendix B.) After a timely appeal to the United States Court of Appeals for the Ninth Circuit, that court likewise affirmed.

REASONS FOR GRANTING THE WRIT

1. The decision below seriously undermines the congressional scheme protecting pension plan interests from judgment creditors.

This case concerns the relationship between two complementary statutes—the anti-alienation provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code and (2) the exemption provisions of the Bankruptcy Code of 1978.

The anti-assignment provisions of ERISA and the Internal Revenue Code require that each qualified pension plan and trust contain explicit language stating that the plan benefits may not be assigned or alienated. This includes involuntary alienation through execution or attachment; 26 C.F.R. § 1.401(a)-(13)(b), *General Motors v. Buha,* 623 F.2d 455 (6th Cir.—1980). The House Report to ERISA stated that the anti-alienation provision was specifically designed to ensure that the employee's accrued benefits would be available on retirement, H. R. Rep. No. 807, 93d Cong., 2 Sess., p. 68. This legislative history should be read in light of the overall purpose of ERISA, which is to ensure "the continued well-being and security of . . . employees and their dependants . . . , " 29 U.S.C. § 1001(a).

The other statutes at issue here are the bankruptcy exemption provisions of 11 U.S.C. §§ 522 and 541(a)(2). Property exemptions were allowed to debtors under English law ever since the bankruptcy laws ceased to be penal in nature, and have been consistently allowed here since the original Act of 1800, 3 *Collier on Bankruptcy* (15th edn), ¶ 522.01, pp. 522-8 to 522-9. In adopting the Bankruptcy Code of 1978, Congress sought to continue this tradition and amplify the exemptions of a debtor in bankruptcy. House Report 95-595, 95th Cong., 1st Sess., p. 126, states in relevant part:

> . . . The historical purpose of these exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge. The purpose has not changed, but neither have the level of exemptions in many States. Thus, the purpose has largely been defeated.
>
> Though exemption laws have been considered within the province of State law under the current Bankruptcy Act, H.R. 8200 adopts the position that there is a Federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start. . . .

The decision below by the Ninth Circuit frustrates the Congressional objectives of these statutes for two reasons.

First and foremost, by allowing a bankruptcy trustee to obtain title and possession of a debtor's pension plan benefits, the Ninth Circuit has, as a practical matter, obliterated the anti-alienation protections of ERISA and the Internal Revenue Code, *supra*. It was error to conclude that these anti-alienation protections were not encompassed by 11 U.S.C. §§ 522(b)(2) and 541(c)(2) absent express statutory authority to do so and given the principle that the exemption statutes be interpreted as broadly as possible in favor of the debtor, *Matter of Smith*, 640 F.2d 888 (7th Cir.—1981). If a pension fund interest is turned over to a bankruptcy trustee it is certainly "alienated" contrary to the provisions of 29 U.S.C. § 1056, 26 U.S.C § 401(a)(13) and 26 C.F.R. § 1.40(a)(13)(b), since the trustee has a duty to then distribute these funds to estate creditors pursuant to 11 U.S.C. §§ 704 and 507.

Once a bankruptcy trustee is empowered to reach a pension plan interest, any individual creditor can do so. All such a creditor need do is file an involuntary bankruptcy petition against the judgment debtor. Such a petition must be granted if the creditor shows that the debtor "is generally not paying such debtor's debts as such debts become due . . . ", 11 U.S.C. § 303(h)(1). This has been held to include nonpayment of a single debt owed to a single

creditor, *In re Blaine Richards & Co., Inc.*, 16 B.R.W. 362, 365 (Bkrtcy.E.D.N.Y., 1982).

Thus, under the Ninth Circuit holding in this case, any judgment creditor who sought to reach pension plan interests could completely circumvent the statutory protections of pension plan interests through the use of the bankruptcy forum.

Second, by suggesting that an exemption from execution may be recognized in a traditional civil proceeding and yet disallowed in bankruptcy, see Appendix A, p 16, n 20, the decision below upsets a most basic Congressional policy consideration behind the bankruptcy exemption statutes.

The whole point of Section 522(b)(2) of the Bankruptcy Code is to give debtors an election to mirror bankruptcy exemptions with traditional civil exemptions from execution. The legislative history to 11 U.S.C. § 522, House Report No. 95-595, 95th Cong., 1st Sess., states at p 360:

> Subsection (b), the operative subsection of this section, is a significant departure from present law. It permits an individual debtor in a bankruptcy case a choice between exemption systems. The debtor may choose the Federal exemptions prescribed in subsection (d), or he may choose the exemptions to which he is entitled under other Federal law and the law of the State of his domicile. . . .

The power of Congress to effectuate the different exemption law of various States was recently recognized by this Court in *Railway Labor Executives Assoc. v. Gibbons*, 455 U.S. 445 [102 S.Ct. 1169, 1176; 71 L.Ed. 2d 335] (1982):

> Pursuant to Art. I, § 8, cl. 4 of the Constitution, Congress has power to enact bankruptcy laws that are uniform throughout the United States. Prior to today, this Court has never invalidated a bankruptcy law for lack of uniformity. The uniformity requirement is not a straightjacket that forbids Congress from distinguishing among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner. A bankruptcy law may be uniform and yet "may

> recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States." *Stellwagen v. Clum,* 245 U.S. 605, 613, 38 S.Ct. 215, 217, 62 L.Ed. 507 1918), thus, uniformity does not require the elimination of any differences among the States in their laws governing commercial transactions. *Vanston Bondholders Protective Committee v. Green,* 329 U.S. 156, 172, 67 S.Ct. 237, 244, 91 L.Ed. 162 (1946) (Frankfurter, J., concurring). In *Hanover National Bank v. Moyses,* 186 U.S., at 189-190, 22 S.Ct., at 861, this Court held that Congress can give effect to the allowance of exemptions prescribed by state law without violating the uniformity requirement.

Given the fact that Congress has chosen to exercise this constitutional power, a Bankruptcy Court should not be permitted to imply its own rules as to exemption issues in derogation of the statutory directive that existing State and Federal nonbankruptcy civil exemptions be enforced in bankruptcy. The results of establishing a "double standard"—one for bankruptcy and one for traditional civil execution—will be (1) a frustration of the debtor's right to elect between the State and nonbankruptcy Federal exemptions and the Federal bankruptcy exemptions set forth in 11 U.S.C. § 522(d) and (2) an unauthorized dilution of the effect of local law in bankruptcy. Both these results are contrary to the expressed legislative intent behind the Bankruptcy Code of 1978, *supra,* and are sanctified by the erroneous Ninth Circuit ruling in this case.

2. The Decision Below Conflicts With Decisions Of The Fourth And Sixth Circuit Courts Of Appeal On The Same Matter.

The holding of the Ninth Circuit in this case is directly contrary to the recent holding by the Fourth Circuit in the action *McLean v. Cent. States S&S Areas Pen. Fund,* 762 F.2d 1204 (4th Cir.—1985). In *McLean,* a bankruptcy trustee sought an order compelling a pension fund administrator to turn over plan benefits. The fund administrator opposed the pay order on the basis of an anti-alienation provision in the fund's trust agreement which was required by 29 U.S.C. § 1056, 26 U.S.C. § 410(a)(13), and

26 C.F.R. § 1.401(a)-(13)(b) and nearly identical to the restrictions on voluntary and involuntary transfer of the petitioner's plan interest in the instant case. The Bankruptcy Court issued the pay order. The Fourth Circuit reversed, stating at p. 1206:

> The dispositive issue is whether McLean's interest in the trust fund is bankruptcy estate property, hence subject to a pay order. The Trustee contends that it is; Central, that it is not. We agree with Central.
>
> We construe the relevant statutory provisions as follows. The Bankruptcy Code, 11 U.S.C. § 541(a)(1), now broadly brings within the definition of estate property all legal or equitable interests of the debtor in property except for interests defined in §§ 541(b) and 541(c)(2). *See Bezanson v. Maine National Bank (In re Kwaak)*. 42 B.R. 599, 601 (Bankr.D.Me. 1984) Section 541(c)(2) provides that a restriction on the transfer of a beneficial interest in a trust enforceable under applicable non-bankruptcy law is enforceable in bankruptcy. Therefore, interests of the debtor subject to such enforceable transfer restrictions are not estate property. *See id.*[4]

Other cases expressing the rule that funds in I.R.S.-qualified pension funds are exempt from execution under federal non-bankruptcy law are *Tenneco, Inc. v. First Virginia Bank of Tidewater*, 678 F.2d 688 (4th Cir.—1983) [funds not subject to garnishment even though beneficiary could request immediate lump sum payment]; *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir.—1980), *Commercial Mortgage Ins., Inc. v. Citizens National Bank*, 526 F.Supp. 510 (N.D.Tex. 1981); *In re*

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[4] The Fourth Circuit went on to hold that the anti-alienation provision could be enforced because it was valid under Illinois State law. Petitioner Daniel contends that State law enforceability is immaterial because the question has been preempted by ERISA, see *Commercial Mortgage Ins. Inc. v. Citizen's Nat'l Bank of Dallas*, 526 F.Supp. 510, 521-523 (N.D.Tex., 1981). In any case, the point is moot here because "spendthrift" trust restrictions are enforceable under California law, *Seymour v. McAvoy*, 121 Cal. 438, 442 [53 P. 946] (1898), *Jacks v. Monterey County etc. Bank*, 70 Cal. 2d 494, 502 [127 P.2d 532] (1942).

Threwitt, 24 B.R.W. 927 (D. .D.Kan. 1982); *Warren v. G. M. Scott & Sons*, 34 B.R.W. 543 (Bkrtcy.S.D.Ohio, 1983); *In re Pruitt*, 30 B.R.W. 330 (Bkrtcy.D.Colo., 1983); *In re Rogers*, 24 B.R.W. 181, 183 (Bkrtcy.D.Ariz. 1982); *In re Holt*, 32 B.R.W. 767 (Bkrtcy E.D.Tenn. 1983); *In re Hinshaw*, 23 B.R.W. 233 (Bkrtcy.D.Kan. 1982). See also *Matter of Berndt*, 34 B.R.W. 515 (Bkrtcy.N.D.Ind., 1983).

In ruling against Dr. Daniel below, the Ninth Circuit Court of Appeals adopted the view represented by *Matter of Goff*, 706 F.2d 574 (5th Cir.—1983),[5] which held that a bankrupt debtor's interest in a "Keogh" plan was not exempt from his estate pursuant to the State and Federal non-bankruptcy provisions of § 522(b).

This Court should accept review to resolve the dispute created by the faulty analysis of the *Goff* line of cases. The *Goff* court held that when Congress enacted § 522(b)(2)(A) it intended to exclude 26 U.S.C. § 401(a)(13) and 29 U.S.C. § 1056 from the class of federal exemptions enforced in bankruptcy under that section. This conclusion was based on a review of the legislative history of Section 522 which lists nine examples of federal non-bankruptcy exemptions sought to be encompassed by Section 522, e.g. social security payments and civil service retirement benefits. The list does not include 26 U.S.C. § 401(a)(13) or 29 U.S.C. § 1056. [House Report No. 95-595, 95th Cong., 1st Sess. 360 (1977); Senate No. 95-989, 95th Cong., 2nd Sess. 751 (1978).] The *Goff* court reasoned that because ERISA funds were excluded as an example in the legislative history, it can be inferred that they should be excluded from protection under § 522. The problem with this reasoning is that there was and is absolutely nothing in the subject legislative history indicating that the list was meant to be exhaustive. In fact, prior to listing the specific examples the history states "*some* of the items that may be exempted under other Federal Laws include: . . . " [Emphasis

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[5] Also, *Regan v. Ross*, 691 F.2d 81 (2d Cir.—1982), *Matter of Johnson*, 724 F.2d 1138 (5th Cir.—1984), *Matter of Graham*, 776 F.2d 1268 (8th Cir.—1984) and *In re Lichstrahl*, 750 F.2d 1488 (11th Cir.—1985).

added.] Furthermore, as noted by the Bankruptcy Court in *In re Hinshaw, supra,* the language of 26 U.S.C. § 401(a)(13) and 29 U.S.C. § 1056 are so similar to those statutes listed in the legislative history of § 522 that they should not be excluded from its protection absent an *express* statement by Congress.

As will be shown below, this conflict between the Fourth and Sixth Circuits, on one hand, and the Fifth, Eighth, Ninth and Eleventh Circuits, on the other, creates an uncertainty over issues having a broad, national economic impact. It is respectfully submitted that this Court should accept review to resolve this uncertainty and to establish a uniform rule.

3. Resolution of the Issues in this Case Is Important to a Substantial Segment of American Society

An excellent barometer of the importance of this case is the large number of reported decisions by the many Courts of Appeals, District Courts, and Bankruptcy Courts, *supra,* where the same issues have been litigated. This activity is not surprising, since the relationship between pension plans and personal insolvency is an important issue to literally millions of individuals.

Due to the widespread use of credit in our society, there has been a dramatic increase in the number of personal bankruptcy filings in recent decades. As of 1977, the Legislative History to the Bankruptcy Code of 1978 noted:

> "... [T]he number of personal bankruptcies has risen over 2,000 per cent in the past 30 years. The rise has parallelled the rise in the amount of consumer credit outstanding." [House Report No. 95-595, at p 116.]

Since the enactment of the Bankruptcy Code of 1978, the number of personal bankruptcies has again almost trebled. In the year 1977, 172,423 individuals sought protection of the Bankruptcy Courts. By 1982, the number of individual filings increased to 450,086.[6] There has also been an explosion in the use of pension and profit sharing plans as estate planning, investments,

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[6] U.S. Dept. of Commerce, *Statistical Abstract of the United States 1984* (104th edn), p 356.

and deferred compensation devices since the enactment of ERISA. Over 47,000,000 Americans now have interests in qualified private pension and profit sharing plans aggregating more than $573.4 billion.[7] This case will determine the power of the Bankruptcy Courts to administer the portion of those funds belonging to the hundreds of thousands of individuals who file bankruptcy every year. Obviously, a decision by this Court on this case will have a significant economic impact on millions of individual Americans, the financial community as a whole, and national bankruptcy estate administration.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit.

December 15, 1985

Respectfully submitted,

JOHN H. MACCONAGHY
2354 Powell Street
Emeryville, California 94608
Counsel for Petitioner

KOLLER & MACCONAGHY
LYNN ANDERSON KOLLER
2354 Powell Street,
Watergate Center
Emeryville, California 94608
Of Counsel for Petitioner

(Appendices follow)

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[7] *Id.*, at p 384.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE:
HOWARD DOUGLAS DANIEL,
Debtor.

HOWARD DOUGLAS DANIEL,
Debtor-Appellant,

v.

SECURITY PACIFIC NATIONAL BANK, COMMERCIAL BANK OF SAN FRANCISCO, LEASCO CAPITAL CORPORATION, and CAPITAL RESERVE LEASING CORPORATION,
Creditors-Appellees.

No. 84-2412
D.C. No.
CV-1137-MHP
Northern California
OPINION

Argued and Submitted
July 12, 1985—San Francisco, California

Filed September 20, 1985

Before: Cecil F. Poole and Stephen Reinhardt, Circuit Judges, and A. Andrew Hauk,* District Judge.

Opinion by Judge Hauk

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

*Hon. A. Andrew Hauk, Senior United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Bankruptcy/Pensions

Debtor in bankruptcy proceeding appeals a finding that his pension and profit-sharing plan was not exempt from bankruptcy administration and distribution to creditors. Affirmed.

The debtor was a physician whose professional corporation, of which he is the sole director and shareholder, set up a pension and profit-sharing plan which he managed and controlled. The plan contained the standard anti-alienation clause required by ERISA, 29 U.S.C. § 1056(d)(1), and the Internal Revenue Code, 26 U.S.C. § 401(a)(13), and was approved as a qualified tax exempt plan by the Internal Revenue Service in 1971. The debtor made contributions at the end of each fiscal year based on profits, and in 1981 he borrowed most of the money in the plan, $75,000, to purchase a house. The loan was for one year, at 10%, but when due he rolled it over, requiring that interest only payments based on 12.5% interest be paid for five years. Apparently no interest payments were ever made. In September of 1982, two weeks before filing a petition in bankruptcy, the debtor contributed $39,000 to the plan, an amount nearly twice the amount made the previous year, and amounting to all the corporation's available cash. After filing for relief under Chapter 7 of the Bankruptcy Code, the debtor chose to exempt assets specified as exempt under local state law (California) or under Federal non-bankruptcy law, as directed by 11 U.S.C. § 522(b)(2)(A). The creditors, under Bankruptcy Rule 4003, filed an "Objection To Debtor's Claim of Exemption" with respect to the plan, and after two days of hearings, a U.S. Bankruptcy Judge entered an Order Sustaining the Objection to the Claim of Exemption, because the plan had not principally been used for retirement purposes. The district court affirmed and the debtor appealed.

[1] The debtor's claimed exemption under California Code of Civil Procedure § 690.18(d) is valid only if the plan is designed and used for retirement purposes. **[2]** The evidence shows that the plan was essentially operated to meet the debtor's short-term per-

sonal needs by lending money or shielding and hiding funds from creditors, and the debtor failed to show how his transactions with the plan were in furtherance of legitimate long-term retirement purposes. [3] Further, the debtor's contention that the state law creates an exemption for any "account" provided for in the Internal Revenue Code applies only to "individual retirement accounts," [4] and since this plan was not an IRA it did not qualify for that exemption.

[5] The phrase "applicable non-bankruptcy law" in 11 U.S.C. § 541(c)(2) was intended to give an exemption to state "spendthrift" trusts, and not as a broad reference to all other laws which prohibit alienation. [6] Pursuant to the solid weight of authority of these cases, we hold that the anti-alienation provisions of ERISA and the Internal Revenue Code do not create Federal non-bankruptcy exemptions for ERISA qualified plans under 11 U.S.C. § 522(b)(2)(A).

COUNSEL

Koller & MacConaghy, Lynn Anderson Koller and John H. MacConaghy, Emeryville, California, for the debtor-appellant.

Broad, Schulz, Larson & Wineberg and Robert R. Cross, San Francisco, California, for the creditors-appellees.

OPINION

HAUK, Senior District Judge:

Appellant (debtor in the bankruptcy proceeding) is a physician employed by his own professional medical corporation, the Howard Douglas Daniel, M.D., Professional Corporation, and is the sole director and shareholder of said corporation. Appellees are creditors who successfully objected to debtor's claim of exemption, denied by Bankruptcy Court Order which was affirmed on appeal to the District Court.

JURISDICTION AND STANDARD OF REVIEW

All parties agree that the District Court had Federal subject matter jurisdiction under former 28 U.S.C. 1471, now 28 U.S.C. § 1334; that we have jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 158(d); that the orders of the two lower courts (Bankruptcy and District) are "final" and appealable under *In re Mason*, 709 F.2d 1313, 1317 (9th Cir. 1983); and that the appeal is timely.

The applicable standard of review in a bankruptcy appeal was set forth by this Court in *In re American Mariner Industries, Inc.*, 734 F.2d 426, 429 (9th Cir. 1984), as follows:

> This court reviews the bankruptcy court's findings of fact by the clearly erroneous standard of F.R. Civ.P. 52(a). *In re Comer*, 723 F.2d 737, 739 (9th Cir. 1984). But the bankrupcty court's conclusions of law are subject to *de novo* review.

The general rule applied by this Circuit in the past was that interpretations of state law by a District Judge were entitled to deference and the District Court's determination was accepted on review unless shown to be "clearly wrong." *Clark v. Musick*, [illegible] F.2d 89, 91 (9th Cir. 1980). However, last year in an *en banc* opinion, this Court adopted a new rule that "questions of state law are reviewable under the same independent de novo standard as are questions of Federal law." *Matter of McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984). It is under this independent de novo standard that we have reviewed the District Court's decision and affirm it for the reasons now set forth.

FACTS

In 1971, debtor's corporation formed a pension and profit-sharing plan which was managed and controlled by the debtor. The debtor was one of four beneficiaries of the plan. Section 8.05 of the debtor's plan contained the standard anti-alienation, anti-assignment clause required by ERISA, 29 U.S.C. §

1056(d)(1), and the Internal Revenue Code, 26 U.S.C. § 401(a)(13), in order to qualify the plan as tax exempt. The plan was approved as "qualified" by the Internal Revenue Service on March 25, 1971.

The plan gave the debtor great latitude in withdrawing his beneficial interest, which became 100% vested and non-forfeitable after five years of employment. The plan provided that in the event of termination of the debtor's employment with the corporation, he would be entitled to payment of his accrued beneficial interest. The plan was also subject to amendment or discontinuance at will by the employer (i.e., the debtor). Finally, the debtor was entitled to "borrow" against his interest on an unsecured basis with virtually no constraints on repayment.

Between 1971 and 1982, the corporation made total contributions to the plan in the sum of $128,318.00, with fiscal year end amounts as follows:

Date of Plan Contribution	Fiscal Year Ending	Amount
3/15/71	3/31/71	$ 8,720.00
3/20/72	3/31/72	10,000.00
3/18/73	3/31/73	10,000.00
2/14/74	3/31/74	500.00
N/A	3/31/75	0.00
3/01/76	3/31/76	100.00
3/21/77	3/31/77	15,360.00
3/31/78	3/31/78	15,000.00
3/30/79	3/31/79	2,000.00
3/28/80	3/31/80	20,000.00
3/30/81	3/31/81	23,000.00
3/26/82	3/31/82	23,638.00

On May 20, 1981,[1] the debtor borrowed $75,000 from the plan

[1]Note that the debtor's Statement of Affairs (Appellant's Excerpts of Record on Appeal, p. 7), Appellee's Brief (p.3) and Appellant's Brief (p.13), list the date of the loan as May, 1981, while the Bankruptcy Court (Appellant's Excerpts of Record on Appeal p.17) and District Court (Appellant's Excerpts of Record on Appeal p.29) refer to the loan date as May, 1980. We believe *1981* is the correct year.

to buy a house, agreeing to repay the loan in one year with 10% annual interest. The loan represented most of the debtor's interest in the plan and was not secured except by the debtor's interest in the plan. The plan was not given a deed of trust to the property and was not named as an insured on the homeowner's insurance policy. The debtor borrowed from the plan on these terms without attempting to inquire whether, or on what terms, he could have financed his residence through a bank or savings and loan nstitution.

On August 4, 1981, the debtor amended the terms of the plan making himself the sole trustee. The corporation applied to the I.R.S. for approval of the amended plan and on May 10, 1982, the approval was issued.

When the $75,000 loan became due on May 20, 1982, the debtor rolled it over, giving the plan a new promissory note payable to himself, as trustee. The note bore a 12.5% annual interest and was payable "interest only in annual installments commencing May 20, 1983." No repayment of principal was due until May 20, 1987. Apparently no interest payments were ever made on the note.

On September 30, 1982, approximately two weeks before filing a petition in bankruptcy, the debtor caused his corporation to contribute a total of $39,000 to the plan, representing all the corporation's available cash.

The September 30. 1982 contribution, although within the I.R.S. guidelines, differed from earlier contributions in that it totalled nearly twice the largest contribution for any previous year. Even though all previous contributions had been made close to the end of each fiscal year (March 31st) and had been based on the corporation's profits, the September 30th, 1982 contribution was made in the middle of the fiscal year, long before any profit or loss could be ascertained, and was therefore not based on any profit calculation.

Debtor's vested interest in the pension plan is now approximately $98,000.00 out of a total plan fund of $179,144.00.

PROCEEDINGS BELOW

On October 12, 1982, debtor-appellant filed his petition for relief under Chapter 7 of the Bankruptcy Code of 1978 in the United States Bankruptcy Court for the Northern District of California.

Under the debtor protection provisions of the Bankruptcy Code, an individual who files a petition for relief is entitled to a number of "exemptions" whereby certain of his assets are excluded from bankruptcy administration and distribution to his creditors. 11 U.S.C. § 522.

Section 522(b)[2] of the Code is structured to give the debtor an election or choice to exempt either the particular bankruptcy law assets specified by 11 U.S.C. § 522(d),[3] as directed by §

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[2]11 U.S.C. § 522(b) provides in relevant part:

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place;

. . .

[3]As to exemptions for pension and profit-sharing plans 11 U.S.C. 522(d)(10)(E) provides, in pertinent part,

§ 522. Exemptions.

(d) The following property may be exempted under subsection (b)(1) of this section:

(10) The debtor's right to receive—

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless –

522(b)(1);[4] or those assets specified as exempt under the provisions of the debtor's *local state law* or under *Federal non-bankruptcy law*, as directed by § 522(b)(2)(A).[5] Debtor elected to claim his vested interest in the pension and profit-sharing plan as exempt under then existing California law, former California Code of Civil Procedure § 690.18(d) [former C.C.P. § 690.18(d)],[6] pursuant to 11 U.S.C. § 522(b)(2)(A).

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. § 401(a), 403(b), 408, or 409).

[4]See Footnote 2, 11 U.S.C. § 522(b)(1), for the exact language.

[5]See Footnote 2, 11 U.S.C. § 522(b)(2)(A), for the exact language.

[6]California Code of Civil Procedure § 690.18(d), which was in effect at the time the debtor filed his petition for relief, provided:

(d) Except with regard to a judgment or order for child or spousal support payments, money held, controlled, or in process of distribution by any private retirement plan, including, but not limited to, union retirement plan, or *any profit-sharing plan designed and used for retirement purposes*, or the payment of benefits as an annuity, pension, retirement allowance, disability payment or death benefit from such retirement or profit-sharing plans, and all contributions and interest thereon returned to any member of any such retirement or profit-sharing plan, whether the same shall be in the actual possession of such pensioner or beneficiary, or deposited by him, are exempt from execution, attachment, or garnishment. Except with regard to moneys withheld from employees' wages and contributions based on wages in employment under provisions of the Unemployment Insurance Code, the exemption given by this subdivision shall apply to any moneys held in self-employed retirement plans and individual retirement annuities or accounts provided for in the Internal Revenue Code of 1954 as amended by the federal "Employee Retirement Income Security Act of 1974" (P.L. 93-406, 29 U.S.C. 1001 et seq.) and by the "Tax Reform Act of 1976" (P.L. 94-455), provided that such moneys do not exceed the maximum amounts exempt from federal income taxation under these acts. [Emphasis added.]

On December 8, 1982, pursuant to Bankruptcy Rule 4003, debtor/appellant's creditors, Security Pacific National Bank, Commercial Bank of San Francisco, Leasco Capital Corporation and Capital Reserve Leasing Corporation, filed an "Objection To Debtor's Claim of Exemption" with respect to the debtor's interest in the pension and profit-sharing plan. Two days of hearings on the objection to the claim of exemption were held before the Honorable Robert L. Hughes, United States Bankruptcy Judge. Having elected the state law exemption under Section 522(b)(2)(A) of the Bankruptcy Code, which also permits use of certain Federal non-bankruptcy exemptions, the debtor advanced both state law and Federal non-bankruptcy law arguments before the Bankruptcy Court.

On January 24, 1984, Judge Hughes entered an "Order Sustaining The Objection to The Claim of Exemption". The Bankruptcy Court held that Dr. Daniel's interest in the plan was not exempt under former C.C.P. § 690.18(d) because the debtor had not principally used the plan for retirement purposes. The effect of the Bankruptcy Court's order was to deny the claim of exemption for debtor's vested interest in the pension and profit-sharing plan and to require debtor to turn over his interest in the retirement plan to his trustee in bankruptcy for distribution to his creditors. Notice of Entry of the Order was filed on January 27, 1984. On that same day, appellant Daniel filed a timely Notice of Appeal to the District Court for the Northern District of California pursuant to Bankruptcy Rule 8002.

On July 27, 1984, the District Court entered its Memorandum Decision and Order, which affirmed the Bankruptcy Court's findings and conclusions on both Federal and state law grounds.

The District Court agreed that the debtor's self-interested handling of the plan defeated any exemption under California law and, in addition, concluded that Congress did not intend to include ERISA or Internal Revenue Code qualified pension plans as Federal non-bankruptcy exemptions under 11 U.S.C. § 522(b)(2)(A).

DISCUSSION

I. *Debtor's Pension and Profit-Sharing Plan Was Not Exempt Under California State Law.*

A. *The Lower Courts Properly Held That Under Former C.C.P. § 690.18(d), The Debtor's Plan Was Exempt Only If "Used For Retirement Purposes."*

In his brief, debtor/appellant argues for a broad construction of former C.C.P. § 690.18(d) in favor of the debtor. Appellant argues that under a liberal interpretation of the California statute "any private retirement plan" would be exempt from inclusion in the bankruptcy estate. Appellant contends that the language of this statute first sets forth an alleged unlimited exemption for any retirement plan and that the use of the phrase "including, but not limited to" after the broad exemption indicates that the rest of the plans described after those words are simply examples of some of the types of plans that qualify for exemption.

However, a careful analysis of former C.C.P. § 690.18(d), in effect on the date of the debtor's petition, does not lead to any such interpretation. Instead, it is clear that the then existing California statutory exemption applied to (1) money held, controlled or in the process of distribution by (a) any private retirement plan, including but not limited to union retirement plans *or* (b) *any profit-sharing plan designed and used for retirement purposes;* (2) the payment of benefits as an annuity, pension, allowance, disability payment or death benefit from (a) such retirement *or* (b) *such profit-sharing plan;* and to (3) all contributions and interest returned to any member of (a) any such retirement *or* (b) *any such profit-sharing plan.* Essentially, former C.C.P. § 690.18(d) covered two different types of plans—"retirement plans" and "profit sharing plans;" however, plans of the latter type were exempted only if designed and used for retirement purposes.

[1] Under the explicit language of the California statute, a

"profit-sharing plan designed and used for retirement purposes" is not a sub-species of "any retirement plan", but is its own separate and distinct type of plan. Indeed, the new structure of new C.C.P. § 704.115,[7] which is the recodification of former C.C.P. § 690.18(d), explicitly supports this interpretation. See C.C.P. § 704.115(a)(1) and (a)(2). Therefore, a profit-sharing plan, in order to qualify for an exemption, must be "designed and *used* for retirement purposes." [Emphasis added.]

B. *The Subject Profit-Sharing Plan Was Not "Used For Retirement Purposes."*

The debtor has conceded since the start of the litigation that the plan is a *profit-sharing plan.* As previously emphasized, in order to qualify for an exemption, the profit-sharing plan had to be "designed and used for retirement purposes." Although the Bankruptcy Court and the District Court indicated that the plan may have been originally "designed" for retirement purposes, the

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[7]California Code of Civil Procedure § 690.18(d) was repealed effective July 1, 1983, and recodified as § 704.115, which now provides, in relevant part, as follows:

> § 704.511. Private retirement plans; exemption; periodic payments
>
> (a) As used in this section, "private retirement plan" means:
>
> (1) Private retirement plans, including, but not limited to, union retirement plans.
>
> (2) *Profit-sharing plans designed and used for retirement purposes.* [Emphasis added.]
>
> (3) Self-employed retirement plans and individual retirement annuities or accounts provided for in the Internal Revenue Code of 1954 as amended, to the extent the amounts held in the plans, annuities, or accounts do not exceed the maximum amounts exempt from federal income taxation under that code.
>
> (b) All amounts held, controlled, or in process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan are exempt.
>
> (c) * * * *
>
> (d) After payment, the amounts described in subdivision (b) and all contributions and interest thereon returned to any member of a private retirement plan are exempt. . . .

basic issue there was, and here is, whether the plan was "*used*" for retirement purposes.

Two discrete transactions viewed together led the Bankruptcy and District Judges to conclude that the debtor did *not* "*use*" the plan principally for retirement purposes. *First* in May, 1981 the debtor, acting as trustee of the plan, made a $75,000 unsecured loan to himself so that he could purchase a home. While this transaction did not violate any federal tax provisions or ERISA requirements, the debtor did not establish his ability to obtain funds commercially on as favorable a basis and therefore did not establish that the loan benefited the plan's retirement purposes.

Although debtor argues that the plan benefited from the interest on the loan, nevertheless, the unsecured nature of the loan at a favorable interest rate, the fact that the loan amount was substantially equal to the debtor's interest in the plan, and the fact that the debtor rolled over his repayment to the plan—all certainly support the inference that the transaction was more a withdrawal than a loan, thereby negating a retirement "use" purpose. If debtor's real concern had been retirement, rather than buying a residence with pre-tax dollars, he would surely have invested the funds in assets which would yield a competitive money market return, would provide adequate security, and would preserve and enhance the capital of the plan.

Second, the transfer of $39,000 from the corporation to the plan on the eve of bankruptcy further demonstrates that the debtor's use of the plan was not for retirement purposes. The plan provided for deposits, at the employer's discretion, at year-end based on profit calculations. Although earlier deposits may have complied with these plan provisions, this final contribution was made at mid-year and in the absence of any profit calculations.

Debtor contends that the $39,000 which was transferred to the plan was a corporate asset which would not have been otherwise available to the creditors. However, since the transfer of all of the corporation's available cash lowered the value of the corporation's stock, which *was* an asset of the bankruptcy estate avail-

able to creditors, the plan *was* used to shield and hide debtor's assets from his creditors.

The fact that the pre-bankruptcy contribution of $39,000 was not fraudulent and not violative of ERISA or the Internal Revenue Code does not dispose of the question of whether the plan was used for retirement purposes. While it is well recognized that a debtor may convert non-exempt property to exempt property on the eve of bankruptcy, *Love v. Minick*, 341 F.2d 680 (9th Cir., 1965), the shielding and hiding of assets from creditors is clearly not a "use for retirement purposes."

[2] Thus, the plan essentially operated to meet debtor's short-term personal needs by lending money or shielding and hiding funds from creditors. Moreover, the debtor has failed to show how his transactions with the plan, by virtue of his role as trustee, were in furtherance of legitimate long-term retirement purposes.

In light of the evidence, the lower courts were amply justified in finding that the debtor's plan was not principally "used for retirement purposes," as required by former C.C.P. § 690.18(d).[8]

C. *The Plan Is Not An "Account" Subject To Exemption Under Former C.C.P. § 690.18(d).*

Appellant argues that the second sentence of former C.C.P. § 690.18(d)[9] created an exemption for any "account" provided for in the Internal Revenue Code. Appellant further contends that since his pension and profit-sharing plan was established under § 401 of the Internal Revenue Code of 1954 as amended by § 1056 of the Employee Retirement Income Security Act of 1974 and since the amount in the fund did not exceed the maximum amount exempt from federal income taxation, the plan was exempt from execution under former C.C.P. § 690.18(d).

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[8]See Footnote 6, for the exact language of C.C.P. § 690.18(d).

[9]See Footnote 6, for the exact language of the second sentence of C.C.P. § 690.18(d).

[3] However, it is clear that the phrase "individual retirement" modifies "accounts" as well as "annuities". Thus the statute does not exempt *all* "accounts . . . provided for in the Internal Revenue Code", but *only* that kind of individual retirement account commonly known as an IRA.

The debtor's interest in the plan cannot be an IRA. The plan was established by the debtor's corporation under IRC § 401(a), while IRA, by contrast, must be established pursuant to IRC § .9. See 26 U.S.C. § 219. Moreover, section 219(b)(2)(A)(i)[10] specifically forbids an IRA deduction by one who, like the debtor here, is "an active participant in . . . . . [a] plan described in section 401(a)."

[4] It follows then, that since appellant's interest in the corporate plan was not an IRA, it did not qualify for exemption under the second sentence of former California C.C.P. § 690.18(d).[11]

II. *The Debtor's Pension and Profit Sharing Plan Was Not Exempt From The Bankruptcy Estate Under Federal Non-Bankruptcy Law.*

Appellant/debtor argues that the anti-alienation, anti-assignment prohibitions in 29 U.S.C. § 1056(d)(1)[12] [ERISA]

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[10]Former 26 U.S.C. § 219(b)(2)(A)(i) provided:

§ 219. Retirement savings

. . . .

(b) Limitations and restrictions.

. . . .

(2) Covered by certain other plans.--No deduction is allowed under subsection (a) for an individual for the taxable year if for any part of such year—

(A) he was an active participant in—

(i) a plan described in section 401(a) which includes a trust exempt from tax under section 501(a) . . .

[11]See Footnote 6, for the exact language of the second sentence of C.C.P. § 690.18(d).

[12]29 U.S.C. § 1056(d)(1) states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

and 26 U.S.C. § 401(a)(13)[13] [Internal Revenue Code], which are incorporated into his pension and profit sharing plan, create federal non-bankruptcy exemptions under 11 U.S.C. § 522(b)(2)(A).[14] In addition, by citing certain cases from Bankruptcy Courts,[15] appellant apparently contends, for the first time in this appeal, that the ERISA and IRC anti-assignment and anti-alienation provisions included in the plan provide the basis for the plan's exclusion from the bankruptcy estate under 11 U.S.C. § 541(c)(2),[16] which protects property subject to

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[13]IRC § 401(a)(13) specifies that "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated."

"Alienated" as it is used in 26 U.S.C. 401(a)(13) includes an involuntary transfer to an executing creditor.

IRC Reg. 1.401(a)—(13)(b)(1) provides:

> Under section 401(a)(13) a trust will not be qualified unless the plan of which the trust is a part provides that benefits under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy or other legal or equitable process.

[14]See Footnote 2 for the exact language.

[15]*In re Threewitt*, 24 B.R. 927, (D.Kan. 1982); *Warren v. G.M. Scott & Sons* 34 B.R. 543 (Bankr. S.D. Ohio 1983); *In re Holt*, 32 B.R. 767 (Bankr. E.D Tenn. 1983); *In re Pruitt*, 30 B.R. 330 (Bankr. D. Colo. 1983); *In re Rogers*, 2- B.R. 181 (Bankr. D. Ariz. 1982);

[16]11 U.S.C. § 541(c) provides:

> § 541. Property of the estate.
>
> (c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—
>
> (A) that restricts or conditions transfer of such interest by the debtor; or
>
> (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.
>
> (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

restrictions on alienation which are *enforceable under "applicable non-bankruptcy law."*

In the *Matter of Goff*, 706 F.2d 574 (5th Cir. 1983), upon which the District Court relied, the Fifth Circuit explicitly considered the types of exemptions and exclusions envisaged by both 11 U.S.C. § 522(b)(2)(A) and 11 U.S.C. § 541(c)(2). The *Goff* case makes it clear that Congress *never intended* for the ERISA and IRC anti-alienation provisions to create exemptions or exclusions for pension plans under either the federal non-bankruptcy exemption of 11 U.S.C. § 522(b)(2)(A) or the non-bankruptcy exclusions of 11 U.S.C. § 541(c)(2).

The reasoning and results in the *Goff* case have been followed by every other Circuit which has considered the issue of whether IRC or ERISA qualified plans are properly excluded or exempted under either 11 U.S.C. § 541(c)(2) or 11 U.S.C. § 522(b)(2)(A). See *In re Graham*, 726 F.2d 1268 (8th Cir. 1984) and *In re Lichstrahl*, 750 F.2d 1488 (11th Cir. 1985).

The *Lichstrahl* case, which is the most recent decision by a Circuit Court reviewing and approving the *Goff* and *Graham* holdings, contains an excellent and succinct discussion of the very issues raised by Appellant in this appeal. As in the present case, the debtor in *Lichstrahl* was a surgeon who was the sole director and stockholder of his professional medical corporation. His corporation created pension plans pursuant to 29 U.S.C. § 1001 et seq (1982) (ERISA) and 26 U.S.C. § 401 (IRC). The plans contained prohibitions on assignment or alienation of the beneficiaries' interests. The *Lichstrahl* Court held that the plans were not properly excluded under 11 U.S.C. § 541(c)(2) and could not be exempted under 11 U.S.C. § 522(b)(2)(A). *Id.* at 1489.

[5] Addressing the issue of *Federal non-bankruptcy* exclusions in view of the legislative history of 11 U.S.C. § 541(c)(2),[17] the *Lichstrahl* Court emphasized at 1489-1490:

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[17]Both House and Senate reports expressly limit section 541(c)(2) to spendthrift trusts. The House Report, moreover, states that the Bankruptcy Code of

> Under § 541 of the Bankruptcy Code, all property in which a debtor has a legal or equitable interest at the time of bankruptcy comes into the estate. 11 U.S.C. § 541(a)(1) (1982). What constitutes a legal or equitable interest is broadly construed. One exception to the sweeping scope of § 541(a) is § 541(c)(2). It preserves restrictions on the transfer of a beneficial interest of the debtor in a trust which is enforceable under applicable nonbankruptcy law and thus prevents such an interest from inclusion in the property of the estate.
>
> Relying primarily on legislative history, courts have generally interpretated the section's reference to "applicable nonbankruptcy law" as applying *only to state law* concerning spendthrift trusts. See, e.g., *Matter of Goff*, 706 F.2d 574 (5th Cir. 1983); *see also In re Graham*, 726 F.2d 1268 (8th Cir. 1984); [further citations omitted]. *But see In re Pruitt*, 30 B.R. 330 (Bankr.D.Colo. 1983). We too hold that "applicable nonbankruptcy law" refers *only* to *state* spendthrift trust law. Therefore, ERISA-qualifying pension plans containing anti-alienation provisions are excluded pursuant to section 541(c)(2) only if they are enforceable under *state law* as spendthrift trusts. *See Matter of Goff*, 706 F.2d 574 (5th Cir. 1983) [Emphasis added and footnote omitted]

Thus, following the *Goff, Graham* and *Lichstrahl* cases, this court holds that the phrase "*applicable non-bankruptcy law*" in 11 U.S.C. § 541(c)(2) was intended to be a narrow reference to *state* "spendthrift trust" law and not a broad reference to *all* other laws, including ERISA and IRC, which prohibit alien-

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1978 "continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law." [Footnote omitted] H.R.Rep. No. 595, 95th Cong., 2d Sess. 176, reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 5963, 6136; S.Rep. No. 989, 95th Cong., 2d Sess. 83, reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 5869.

ation. Therefore, the ERISA and IRC anti-alienation provisions in debtors pension and profit sharing plan does not create a Federal non-bankruptcy exclusion under 11 U.S.C. § 541(c)(2).

The *Lichstrahl* court also focused its examination on whether IRC and ERISA approved plans could be exempted pursuant to 11 U.S.C. § 552 (1982). As concluded in *Lichstrahl* at 1491:

> We agree with the Fifth Circuit that Congress did not intend to exempt such plans under this section. *See Matter of Goff*, 706 F.2d 574, 585 (5th Cir. 1983); *Matter of Turpin*, 644 F.2d 472, 474 n.1 (5th Cir. 1981) (dicta).
>
> The House and Senate reports on § 522(b)(2)(A) provide a list of property that can be exempted under federal laws.[18] ERISA-qualified pension plans are not included. Although Congress may not have intended the list to be exhaustive, the failure to include ERISA

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[18]Property exempted includes:

Foreign Service Retirement and Disability payments, 22 U.S.C. § 1104;

Social security payments, 42 U.S.C. § 407;

Injury or death compensation payments from war risk hazards, 42 U.S.C. § 1717;

Wages of fishermen, seamen, and apprentices, 46 U.S.C. § 601;

Civil service retirement benefits, 5 U.S.C. §§ 729, 2265;

Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. § 916;

Railroad Retirement Act annuities and pensions, 45 U.S.C. § 228(L);

Veterans benefits, 45 U.S.C. § 352(E);

Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. § 3101; and

Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. § 175.

See S.Rep. No. 989, 95th Cong., 2d Sess. 75, reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 5861; H.R.Rep. No. 595, 95th Cong., 2d Sess. 360, reprinted in 1978 U.S.Code Cong. & Ad.News 5963, 6316.

is nontheless indicative of congressional intent. Congress knew of the much-debated and comprehensive statute when it issued the House and Senate reports on § 522(b)(2)(A) in 1977 and 1978, and yet it did not include ERISA in those reports. *Matter of Goff*, 706 F.2d at 585; *see also In re Graham*, 726 F.2d 1268, 1274 (8th Cir. 1984). Congress, however, did refer to ERISA in other sections of the Bankruptcy Code. Of particular importance is ERISA's inclusion within the alternative federal exemptions listed in § 522(d). The failure to mention ERISA in connection with § 522(b) was intentional. *Matter of Goff*, 706 F.2d at 585.

Furthermore, excluding ERISA-qualified pension plans from the list of property exempted under federal law is consistent with an important distinction between exempted property and property covered by ERISA. Despite the similarity between the anti-alienation provisions of ERISA and some of the listed statutes, the "pensions, wages, benefits and payments included in the . . . list are all peculiarly federal in nature, created by federal law or related to industries traditionally protected by the federal government. In sharp contrast, ERISA regulates private employer pension systems." *In re Graham*, 726 F.2d at 1274. It is this "peculiarly federal nature" shared by the cited statutes that identifies and determines which federal statutes are to be included within the "other federal law" exemption of § 522 and which, like ERISA, are to be excluded. *See Matter of Goff*, 706 F.2d at 586. The failure to mention ERISA in the legislative history accompanying § 522(b)(2)(A) is, therefore, both purposeful and reasoned. [Footnote omitted]

Appellant's reliance on the Ninth Circuit case of *Franchi Tax Board v. Construction Laborers et al.*, 679 F.2d 1307 (9t Cir. 1982), is misplaced since it was reversed by the Supren Court.[19] Moreover, it dealt only with the power to garnish or le

[19]The debtor cites this case as binding authority, ignoring the fact that t decision was reversed, vacated and amended by the Supreme Court on jurisdi tional grounds, 463 U.S. 1 (1983), and thus has no precedential force.

against retirement benefits of a *solvent* debtor under *state* law and did *not* address the nature of *federal* exemptions in a Bankruptcy context. Similarily, appellant's discussion of certain District and Appellate Court cases from other jurisdictions[20] is not on point since those cases likewise do not deal with Federal non-bankruptcy exemptions pursuant to 11 U.S.C. § 522(b)(2)(A).

[6] Although there are a few Bankruptcy Court decisions outside this Circuit to the contrary, the holdings of our sister circuits in *Goff, Graham,* and *Lichstrahl* are controlling and should be adopted by this Circuit. Thus, pursuant to the solid weight of authority of *Goff* and its progeny, we hold that the anti-alienation provisions of ERISA and the Internal Revenue Code do not create Federal non-bankruptcy exemptions for ERISA qualified plans under 11 U.S.C. 522(b)(2)(A).

AFFIRMED.

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[20] *Tenneco, Inc. v. First Tidewater Bank of Virginia*, 698 F.2d 688 (4th Cir. 1983); *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980); *Commercial Mortgage Insurance Inc. v. Citizens National Bank of Dallas*, 526 F.Supp. 510 (N.D. Tex. 1981).

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-84-1137-MHP
Bankruptcy Case
No. 482-03819 HS

In re
HOWARD DOUGLAS DANIEL,
Debtor.

[Filed July 27, 1984

MEMORANDUM DECISION AND ORDER

Debtor appeals a final order of the Bankruptcy Court which denied an exemption of his vested interest in a qualified retirement plan under the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). Having elected the state law exemption under Section 522(b)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 522(b)(2)(A), debtor advanced both state and federal nonbankruptcy arguments before the Bankruptcy Court.

Upon careful review of the papers submitted by the parties, including the transcript of the record below as well as the applicable legal authorities, the court concludes that the Bankruptcy Court's decision must be affirmed.

The facts are not in dispute. In 1971 debtor through his medical corporation formed a pension and profit sharing plan.[1] The plan complied with federal tax law and ERISA requirements. In 1981 debtor became trustee of the plan. In 1982 he arranged a $75,000 loan to himself which was unsecured except by his interest in the plan. That loan was first made at an interest rate of 10%, then later rolled over at an interest of 12½%. The record

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[1] Debtor's reply argument that the plan is other than a profit sharing plan is contradictory to his assertion in his Opening Brief at p. 5, n.1, and is not supported by the evidence or applicable law. The court finds no reason to adopt debtor's characterization of the plan.

does not disclose any repayment. Shortly before the filing of the petition in bankruptcy, debtor caused his corporation to deposit $39,000 to the plan. In contrast to the plan provisions for year-end deposits based on profits, this last deposit was made mid-year and was not based on any profit calculation. Based on these facts the court considers the claimed exempton.

DISCUSSION

This court's review of the Bankruptcy Court's findings of fact requires reversal only where those findings are "clearly erroneous." *Bel Marin Driwall, Inc. v. Grover,* 470 F.2d 932, 934 (9th Cir. 1972). As to conclusions of law, this court must make an "independent determination of the applicable law . . . ." *In the Matter of Pacific Far East Line, Inc.,* 458 F. Supp. 771, 774 (N.D. Cal. 1978).

Under applicable provisions of the Bankruptcy Code, the debtor is permitted to choose between state exemptions under the law of his domicile and federal exemptions. 11 U.S.C. § 522; *see 3 Collier on Bankruptcy* (15th Ed.) § 522.02, p. 522-10. Debtor elected the state law exemption which also permits use of certain federal nonbankruptcy exemptions. 11 U.S.C. § 522(b)(2)(A). The question raised here requires this court to examine the claimed exemption in light of both the federal nonbankruptcy and state law exemptions.

Federal nonbankruptcy laws provide exemptions for certain retirement plans. The legislative history of 11 U.S.C. § 522(b)(2)(A) contains a representative list of exempt assets.

> If the debtor chooses [the state exemption], *some* of the items that may be exempted under other Federal laws include:
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> Foreign Service Retirement and Disability payments, 22 U.S.C. § 1104;
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> Social security payments, 42 U.S.C. § 407;
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> Injury or death compensation payments from war risk hazard, 42 U.S.C. § 1717;

> Wages of fishermen, seamen and apprentices, 46 U.S.C. § 601;
>
> Civil service retirement benefits, 5 U.S.C. §§ 729, 2265;
>
> Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. 916;
>
> Railroad Retirement Act annuities and pensions, 45 U.S.C. § 228(L);
>
> Veterans benefits, 45 U.S.C. § 352(E);
>
> Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. § 3101; and
>
> Federal homestead land on debts contracted before issuance of the patent, 43 U.S.C. § 175. (Emphasis added)

S. Rep. No. 95-989, 95th Cong., 2d Sess. 75, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5861; H. Rep. No. 95-595, 95th Cong., 2d Sess. 360 (1970), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6316.

The court does not read this legislative history as an exclusive list. The prefatory language suggests nonexclusivity. Therefore, while ERISA plans are not included in the enumeration, the question is whether ERISA plans are among those exemptions intended by this provision. The omission is significant because ERISA was a much debated statute and was contemporary with the enactment of the Bankruptcy Code. None of the parties has identified other relevant legislative history. Accordingly, even though the list is not exclusive, it is difficult for this court to infer that despite the omission Congress intended to exempt ERISA plans based on some general intention to exempt retirement plans. More important, the nature and quality of the representative list indicates the narrowness of the exemption Congress intended. In contrast to the representative list, ERISA plans are very broad and cover virtually all employee benefit plans. *See* 29 U.S.C. §§ 1002(1), (2) and (3). The significant difference between the representative list and ERISA plans negates the inference by analogy that Congress intended to include ERISA or overlooked it.

This court is persuaded by the reasoning of *In re Goff*, 706 F.2d 574 (5th Cir. 1983). There, the debtor was denied exemption for his self-employed KEOGH retirement plan. The Fifth Circuit stated

> [g]iven the extensive and general reach of ERISA qualified plans, it is highly improbable that Congress intended their inclusion without mention in the Section 522(b)(2)(A) exemption in the midst of a listing of significantly less comprehensive and less well known statutes.

Id. at 585; *accord, In re Graham*, 726 F.2d 1268, 1274 (8th Cir. 1984).

The court therefore, based on its reading of 11 U.S.C. § 522(b)(2)(A), the legislative history and case law, finds that Congress did not intend to create a federal nonbankruptcy exemption for all ERISA qualified plans.[2]

The papers filed by the parties also raise the issue of whether ERISA preempts state laws. If preemption is found, the anti-alienation requirements of ERISA plans under 29 U.S.C. § 1056 would be given effect over Cal. Code Civ. Proc. § 690.18(d). While the broad preemptive effect granted ERISA under 29 U.S.C. § 1144 might appear to lend itself to such an interpretation, this court finds such a conclusion unwarranted where the state exemption provisions are put in operation by reason of the federal bankruptcy laws.

"[The] preemption doctrine stems from the Supremacy Clause of the United States Constitution and invalidates any state law that contradicts or interferes with an act of Congress." *Hayfield Northern Railroad Company, Inc. v. Chicago and Northwestern Transportation Company*, ____ U.S. ____, 104 S. Ct. 2610, 2614

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[2] In finding that 11 U.S.C. § 522(b)(2)(A) does not include a blanket exemption for ERISA plans, this court does not reach the issue of whether some ERISA-qualified plans might nonetheless be sufficiently analogous to the representative list to warrant an exemption. It is sufficient in this case to note that debtor's plan possessed investment and avoidance features that readily distinguish it from the enumerated examples in the legislative history.

(1984). In contrast to the usual preemption case involving a conflict between federal and state laws, here the conflict is between ERISA and the federal bankruptcy law. The only reason § 690.18(d) has any effect in a bankruptcy proceeding is because 11 U.S.C. § 522(b)(2)(A) so provides. To construe ERISA as preempting § 690.18(d) would "alter, amend, modify . . . or supercede" a federal law which is expressly disclaimed by ERISA. 29 U.S.C. § 1144(d). Even though ERISA may preempt state laws relating to enforcement of judgments in other matters, when the federal bankruptcy laws are being applied it will not supercede the effect of state laws made applicable by its provisions. *In re Graham,* 726 F.2d at 1273. Debtor's reliance on *Franchise Tax Board of California v. Construction Laborers,* 679 F.2d 1307 (9th Cir. 1982), *vacated* ____ U.S. ____, 103 S. Ct. 2841 (1983) is of no avail. In *Franchise Tax Board,* a state levy was disallowed against debtor's union vacation benefits because the benefit came within ERISA protection. The conflict was only between state law and ERISA. However, the instant case concerns the preemption of state laws incorporated by reason of federal bankruptcy law and is thus within ERISA's disclaimer clause. 29 U.S.C. § 1144(d). Therefore, this court holds that the preemptive reach of ERISA does not extend to state judgment enforcement statutes such as § 690.18(d) in the context of a claimed bankruptcy exemption under 11 U.S.C. § 522(b)(2)(A).

Finally, the Bankruptcy Court decision carefully considered the debtor's exemption under California law. It properly characterized the debtor's plan as a pension and profit sharing plan. Under § 690.18(d), an exemption from civil execution is permitted where such "profit sharing plan [was] designed and used for retirement purposes." § 690.18(d). There was no issue as to whether the plan was originally designed for retirement purposes. However, the judge concluded it was not principally "used" for retirement purposes and disallowed the exemption. Debtor challenges both the standard used by the judge, which required that the plan be used "principally" for retirement purposes, and his application of that standard.

The judge's interpretation of § 690.18(d) as requiring that the fund be "principally used for retirement purposes" is not erroneous as a matter of law. None of the parties has cited nor has this court's research led to authority construing the provision "used for retirement purposes." The Bankruptcy Court's decision correctly states that the principal objective of the exemption statutes is to provide for the support and welfare of the debtor and his family, as well as to enable debtor to follow his or her vocation. (Decision at 2.) Debtor incorrectly contends that in view of the liberal construction required in applying the statute, *Roosevelt v. Roosevelt*, 117 Cal. App. 3d 397, 402 (1981), any retirement use would be sufficient.[3] If this were the standard, wholesale avoidance of creditors would be possible.

In accordance with these principles and the evidence before him the judge correctly applied § 690.18(d) to the debtor's use of the plan. Two transactions led the judge to conclude that the debtor did not use the plan principally for retirement purposes. First in May, 1980 the debtor, acting as trustee of the plan, made a $75,000 unsecured loan to himself so that he could purchase a home. While the records disclose this transaction did not violate any federal tax provisions or ERISA requirements, this does not answer the question whether the provisions of § 690.18(d) were satisfied. Because debtor did not establish his ability to obtain funds commercially on as favorable a basis, and did not establish that the loan benefited the plan's retirement purpose, the judge reasonably inferred a nonretirement use. Debtor has argued that the facts imply the opposite conclusion because the plan benefited from the interest on the loan. Here, the unsecured nature of the loan at a favorable interest rate, the fact that the loan amount was substantially equal to the debtor's interest in the plan, and the fact that the debtor rolled over his repayment to the plan certainly support the inference that the transaction was more a withdrawal than a loan, thereby negating a retirement purpose.

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[3] In fact this view, offered at oral argument, is contrary to the debtor's view expressed in his brief on appeal that the plan must be "principally used for retirement purposes."

Second, the transfer of $39,000 on the eve of bankruptcy further demonstrated the debtor's use of the plan was not for retirement purposes. The plan provided for deposits, at the employer's discretion, at year-end based on profit calculations. Earlier deposits were not challenged and presumably complied with the law and plan provisions. However, the final contribution was made at mid-year. It also exceeded all previous deposits by 65% and was made in the absence of any profit calculations. Debtor has argued it is permissible to make last minute conversions of assets to exempt status. The Bankruptcy Court concurred with this view but recognized it is limited to legitimate exemptions. Assuming arguendo that the plan was valid, the transfer still fails because it may reasonably be inferred that the transfer was not only improper for not complying with the provisions of the plan, but also was made in contemplation of bankruptcy.

The judge's conclusion that the plan was used to shield funds from creditors rather than for retirement purposes is well supported by the evidence. The plan essentially operated to meet debtor's short-term needs by loaning or shielding money which remained in his control by virtue of his role as trustee. In short, debtor failed to show how his transactions with the plan were in furtherance of legitimate retirement purposes.

The findings of fact of the Bankruptcy Court are not "clearly erroneous" and are affirmed. *Bel Marin Driwall, Inc. v. Grover,* 470 F.2d 932, 934 (9th Cir. 1972). Although this court's analysis of the issues presented differs from the Bankruptcy Court's, the conclusion is identical. Because this court finds no federal bankruptcy exemption, no preemption by ERISA, and that debtor has failed to demonstrate an exemption under § 690.18(d),

IT IS HEREBY ORDERED that debtor's appeal be DENIED and the decision of the Bankruptcy Court be AFFIRMED.

Dated: July 27, 1984.

/s/ MARILYN HALL PATEL
MARILYN HALL PATEL
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT,
NORTHERN DISTRICT OF CALIFORNIA

Bankruptcy No. 4-82-03819HS

In re
HOWARD DOUGLAS DANIEL,
Debtor.

[Filed December 28, 1983]

MEMORANDUM FOR ORDER

Creditors Security Pacific National Bank, Commercial Bank of San Francisco, Leasco Capital Corp. and Capital Reserve Leasing Corp. have objected to debtor's claim of exemption for his interest in a pension and profit sharing plan. The objection is sustained and the exemption is disallowed.

The facts are not in dispute. In 1971 debtor's corporation formed a contribution pension and profit-sharing plan. At all times the plan complied with the appropriate IRS requirements. The total plan fund is $179,144, in which debtor has a vested interest of $98,000.

Debtor has claimed his entire interest in the plan exempt pursuant to California Code of Civil Procedure § 690.18(d), in effect at the time the order for relief was entered. The section exempts from execution " . . . money held, controlled . . . by any private retirement plan including . . . any profit-sharing plan designed and used for retirement purposes . . ."

(In his supplemental brief filed December 2, 1983, debtor avoids the qualification of "designed and used for retirement purposes", and instead focuses on the exemption afforded to "private retirement plan[s]", which appear not to be similarly qualified. Yet debtor has not contested that his plan is a pension and profit sharing plan funded by the Corporation's year end profits. Consequently, the qualification "designed and used for retirement purposes" applies in this case.)

The objecting creditors contend that debtor's profitsharing plan has not been used principally for retirement purposes and there-

fore is not exempt under CCP 690.18(d), that California may not validly create an unlimited exemption such as claimed by debtor, and that the pre-bankruptcy contribution constitutes a voidable, fraudulent transfer. As I agree with the creditors' first contention, it is unnecessary to discuss their alternative theories.

Whether debtor's interest in the plan is exempt turns on an interpretation of the words " . . . any profitsharing plan designed and used for retirement purposes." It appears that the issue is one of first impression; the parties have cited no cases dealing with this language and the court has found none.

The principal objective of exemption statutes is to provide for the support and welfare of the debtor and the debtor's family and to enable the debtor to follow his or her vocation. See Witkin, California Procedure, 2d Ed. p. 3405-6, California Law Revision Commission, Tentative Recommendation proposing the Enforcement of Judgments Law, 1980, p. 2076. Furthermore, the exemption provision in § 690.18(d) is liberally construed by the California courts. See *Roosevelt v. Roosevelt,* 117 Cal.App. 3d 397, 172 Cal. Rptr. 641 (1981). These principles provide the background for interpreting CCP 690.18(d).

The statutory language requires that a plan, in order to be exempt, be both designed for and used for retirement purposes. It is the latter requirement which has not been met in the present case.

Two particular transactions demonstrate that debtor did not use his interest in the plan for retirement purposes. In May, 1980, he made a $75,000 unsecured loan to himself from the plan, and used the money to buy a house. In September, 1982, two weeks before he filed for Chapter 7 relief, he transferred $39,000 from his practice to the plan.

Lending the funds of the plan to one of the beneficiaries, as was the case here, in exchange for a note secured only by the beneficiary's interest in the plan can hardly be a retirement purpose. The transaction was in reality a withdrawal of a substantial part of debtor's interest, and the transaction cannot be considered an investment to preserve and enhance the capital. I fail to see any way in which this transaction can be said to have

provided for the welfare of the debtor and his family by establishing a capital from which periodic payments in lieu of salary will be made. To the contrary, the transaction is a clear indication that debtor was not using his plan for retirement purposes.

Debtor's transfer of $39,000 to the fund on the eve of bankruptcy is further evidence that his interest is not used for retirement purposes, as required by CCP § 690.18(d). While it is well recognized that a debtor may convert non-exempt property to exempt property on the eve of bankruptcy, *Love v. Minick*, 341 F2d 680 (9th Cir. 1965), the $89,000 transfer was clearly intended to shield assets from creditors rather than provide for retirement purposes. On twelve previous occasions, the annual deposit into the plan had been made in February or March, for the fiscal year ending March 31. In 1982 however, the deposit was made in September, and the amount deposited exceeded the maximum previous deposit by 65%. Debtor admitted in court that at the time he made the transfer, he did not know what the profits for the fiscal year ending March 1983 would be.

Debtor contends that this decision was made by his corporate employer, i.e. debtor wearing his hat as the corporation, and that the funds were corporate assets which would not otherwise have been available to the creditors. Presuming, without deciding, that this is true, it would still not change the uncontested fact that the plan was used to shield assets from creditors, rather than for retirement purposes.

In question here is only the use of the pension plan. Since the debtor did not use his part of the plan for retirement purposes, his interest fails to qualify for the exemption provided by CCP § 690.18(d).

The objecting creditors are directed to prepare, serve and lodge an order in accordance with the views expressed above.

Dated: December 28, 1983

ROBERT B. HUGHES
Bankruptcy Judge